(1) No. 97.104 JUL 17 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Katia Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani,

Petitioners,

v.

Dirk A. Lamagno, The Drug Enforcement Administration, and the United States of America,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

ISIDORO RODRIGUEZ, ESQ.
Attorney for Petitioners

Law Offices of
Isidoro Rodriguez, P.C.
Calle 84, No. 56-51
Piso 2, Oficina 4
Barranquilla, Colombia
(011)57-58-561678/458273

July 15, 1997

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE HOLDING OF THE FOURTH CIRCUIT EFFECTIVELY MAKES THE SCOPE OF EMPLOYMENT CERTIFICATION CONCLUSIVE, BY DENYING LIMITED DISCOVERY AND AN EVIDENTIARY HEARING ON DISPUTED ISSUES OF FACT, AND THEREFORE ARE IN CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS THIRD, NINTH, AND DISTRICT OF COLUMBIA CIRCUITS ON THE SAME ISSUE?

LIST OF PARTIES

The parties that have appeared here include those listed on the case caption.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT . . . 15

CONCLUSION 24

APPENDIX

TABLE OF AUTHORITIES

Cases:

Katia Gutierrez de Martinez et al. v. Dirk A. Lamagno, et al., __ U.S. __, 115 S.Ct. 2272 (1995) . . . 15, 17, 18, 24

Kimbro v. Velten et. al, 30 F.3rd 1501; 1995 U.S. App. Lexis 20259; 208 U.S. App. D.C. 134, cert denied 115 S.Ct. 2584 . . . . . 15, 16, 17

Melo v. Hafer, 13 F.3d 736 (3rd Cir. 1994) 16, 17

Wang v. United States, 947 F.2d 1400, 1402 (9th Cir. 1991) 16

Statute:

28 U.S.C. § 2679(d)(1) 26

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI, AND HENNY MARTINEZ DE PAPAIANI,

Petitioners,

v.

DIRK A. LAMAGNO, THE DRUG ENFORCEMENT ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The June 14, 1995, decision of the United States Supreme Court reversing

and remanding this action is reported as Katia Gutierrez de Martines et al. v. Lamagno et al., __ U.S.__, 115 S.Ct. 227, 132 L.Ed.2d 375 (1995).

The December 7, 1995, decision of the United States District Court for the Eastern District of Virginia from the Supreme Court's remand order is unreported, and is reproduced in the appendix to this petition.

The April 24, 1997, decision of the United States Court of Appeal for the Fourth Circuit from the Supreme Court's remand order, is unpublished and is reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 24, 1997. The jurisdiction of

this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2679
Exclusiveness of remedy

(d)(1) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

Claims for damages were filed in January, 1993, by Mrs. Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani, against Mr. Dirk A. Lamagno, in his individual capacity based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2).

This case returned to the district court after a reversal by the United States Supreme Court on June 14, 1995. The Supreme Court reversed the Fourth Circuit precedent of Johnson v. Carter in Gutierrez de Martines v. Lamagno, __ U.S.__, 115 S.Ct. 227, 132 L.Ed.2d 375 (1995).

Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

B. RELEVANT FACTS

On Friday night, January 18, 1991, DEA Special Agent Dirk Lamagno (hereinafter "Mr. Lamagno") who had been admittedly drinking with fellow DEA Agents at the Steak and Salad Restaurant, a "DEA hangout" in Barranquilla, Colombia (A-64, ¶ 8, A-75, A-77, A-91

and Doc.-47)[1] in the City of Barranquilla, left the DEA hangout at "approximately 10:45 p.m." (A-64, ¶ 8). This DEA hangout is located two short blocks from the Hotel El Prado, where Mr. Lamagno was staying while on temporary duty (TDY) (A-18).

One hour after leaving the restaurant, at approximately 11:45 p.m., (A-2, and A-64, ¶ 8), in the company of an unidentified "thin Hispanic looking woman with long black hair" (A-25, and Doc.-47), Mr. Lamagno was seen failing to stop at marked intersections on Calle 85 (A-21), while driving at an unlawful and reckless high speed in a direction going out of the City of Barranquilla,

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"A- " references are to the to pages number in the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit. "Doc.- " references are to the docket entries on the District Court docket sheet, which is found beginning at A-2.

away from his hotel, towards the intersection of Kra. 47, (A-19 and A-24), in a 1987 Ford Bronco, Silver Blue truck Model 87, identified by non-diplomatic license plates No. LK 9264.

At the same time and place, driving towards the City of Barranquilla on Kra. 47, at the posted rate of speed (A-24), in a 1990 Renault 9 TSE with license plate No. QAL 874, were Mrs. Katia Gutierrez de Martinez (as operator of a motor vehicle), and riding as passengers, were her husband, Mr. Eduardo Martinez Puccini, as well as Mrs. Henny Martinez de Papaiani (hereinafter the "Injured Parties").

Suddenly, when the Injured Parties motor vehicle was midway through the intersection of Kra. 47 with Calle 85, Mr. Lamagno "crossed the intersection at a

high speed without stopping carrying away the vehicle operated by" Mrs. Martinez (Police Traffic Report at A-19). Mr. Lamagno actions were in violation of the traffic laws and ordinances of the Republic of Colombia, and City of Barranquilla (A-9).

After the collision neither Mr. Lamagno, nor his unidentified female passenger, left their motor vehicle to render assistance, thus the Injured Parties were left trapped in their vehicle for 45 minutes, bleeding, unconscious, with facial injuries and broken bones (A-9, ¶ 5).

At that time, the only one of the Injured Parties conscious, Mrs. Henny Martinez, as well as other witnesses of the accident, detected that Mr. Lamagno

was under the influence of alcohol. (A-25, and 35).

When the United States Consul, as well as U.S. Consulate security officers, arrived, they entered into a heated discussion with local police, and other witnesses, because the U.S. Consul was seeking the falsification of the accident report by altering the positions of Mr. Lamagno's Ford Bronco, and the removing the non-diplomatic license plates No. LK 9264, to be replaced with diplomatic license plates No. CD0172 (Amended Complaint A-6 ¶ 13, A-36, ¶ n, A-40 and A-43).

Although having been ordered to appear on January 19, and March 7, 1991, to provide testimony to the Municipal Secretary, concerning the accident, Mr.

Lamagno never did so, having fled the Republic of Colombia.

On January 15, 1993, after having filed an administrative claim with DEA in May of 1991, the first complaint was filed. On March 3, 1993, a Certification of Scope of Employment and a Notice of Substitution, was filed. On March 5, 1993, the Court granted the ex parte Notice of Substitution. In March, 1993, the United States filed a FRCP Rule 12(b) Motion to dismiss the complaint based on the "foreign exception" to the Federal Tort Claims Act. The District Court dismissed the complaint, and the Fourth Circuit Court of Appeals affirmed. Katia Gutierrez De Martinez, et al v. Dirk A. Lamagno, et al., 23 F.3d 401 (1994).

On Writ of Certiorari, the United States Supreme Court, reversed and remanded the action to the District Court on June 14, 1995, based on the holding that the scope of employment certification was subject to challenge and judicial review, Martinez et. al. v. Lamagno et. al., 115 S.Ct. 227, 132 L.Ed. 2d 375 (1995).

On June 27, 1995, the United States Attorney for the Eastern District of Virginia again issued a one paragraph certificate of scope of employment under 28 U.S.C. § 2679(d)(1), stating without any factual support that Mr. Lamagno was acting at the time of the accident within the scope of his employment.

On September 11, 1995, an amended complaint was filed for damages resulting from the actions of the U.S. Consul

and security personnel in acting outside the scope of their employment when they attempted to falsify the police accident report and did change the vehicle license plates (A-6). In addition a motion was filed for a pretrial hearing and limited discovery was filed (A-25).

On August 25, 1995, the District Court issued an ex parte order (A-28), which denied the motion for limited discovery and an evidentiary hearing, and required the parties to file only briefs and affidavits by October 20, 1995, for the District Court to rule based only on said papers.

The Injured Parties filed: (1) a Reply Brief in opposition to the United States Motion for an ex parte/in camera judicial determination to Plaintiff's challenge to the certification of scope

of employment (Doc.-30); a Motion Pursuant to Rule 60b seeking a reconsideration of the ex parte Order of August 25, 1995 (Doc.-35); a Motion under FRCP 44.1 regarding judicial notice of the traffic laws of the Republic of Colombia (Doc.-38); and a Memorandum of Law In support of an Order Setting Aside the Certification of Scope of Employment, with Affidavits (Doc.-37)

On October 16, 1995, the United States filed a Memorandum In Support of Defendant's Motion for Substitution and Motion to Dismiss (Doc.-42). Attachment A, of said pleading was a new Certification of Scope of Employment signed on June 27, 1995, some four months earlier than Attachment B through D. As for Attachment F, it was allegedly drafted February 7, 1991.

On October 27, 1995, the Injured Parties filed a Motion in Limine Objecting the United States False Statements and Hearsay, and Motion to Strike (Doc.-47).

Despite the numerous disputes of facts raised by the above pleading, and the mandate of the Supreme Court for judicial review of the Certification of the Scope of Employment, on December 7, 1995, the District Court entered an order denying the Injured Parties motion for limited discovery and an evidentiary hearing; granted substitution of the United States for Mr. Lamagno, and again dismissed the complaint based on sovereign immunity under the "foreign exception" to the Federal Tort Claims Act.

On April 24, 1997, the United States Court of Appeals for the Fourth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS, SINCE THEY PERMIT DISCOVERY AND AN EVIDENTIARY HEARING WHEN THERE ARE DISPUTED ISSUES OF FACT WHICH CHALLENGE THE SCOPE OF EMPLOYMENT CERTIFICATION.

In the instant litigation, the United States Supreme Court, reversed and remanded the action to the District Court on June 14, 1995, based on the holding that the scope of employment certification was subject to challenge and judicial review, Martinez et. al. v. Lamagno et. al., 115 S.Ct. 227, 132 L.Ed. 2d 375 (1995).

On June 19, 1995, five days after the Martinez decision, Court of Appeals for the District of Colombia in Kimbro v. Velten et. al, 30 F.3rd 1501; 1995 U.S. App. Lexis 20259; 208 U.S. App.

D.C. 134, cert denied 115 S.Ct. 2584, held that it was in agreement with holding of both the Court of Appeals for the Ninth Circuit in Wang v. United States, 947 F.2d 1400, 1402 (9th Cir. 1991); and the Court of Appeals for the Third Circuit in Melo v. Hafer, 13 F.3d 736 (3rd Cir. 1994), in that the district court should permit discovery and conduct an evidentiary hearing on disputed issues of fact to determine the scope of employment issue.

The Court of Appeals for the District of Columbia stated that "[r]egardless of the content of the certification . . . the federal district court must at least conduct an evidentiary hearing on the scope issue." Kimbro, 30 F.3d at 1508.

Furthermore,

> . . . the Third Circuit describes the certification as entitled to "prima facie" effect, see Melo v. Hafer, 13 F.3rd at 747, but treats the district court hearing as a summary judgment motion, **which obliges the plaintiff to come forward after reasonable discovery** with evidence supporting his allegations both as to scope and as to the merits. **If there is a material dispute as to the scope issue the district court must resolve it at an evidentiary hearing**. We agree with this procedure (which in keeping with the statutory scheme here does not really treat the certification as having any particular evidentiary weight). . . . Kimbro 30 F.3rd at 1509.

Thus these appellate decisions, in conjunction with the Supreme Court's holding in Martinez, hold that when challenged the Certification of Scope of Employment is no longer prima facie evidence, but subject to independent judicial review.

In the instant case the Supreme Court specifically held that the courts must be mindful that cases of the kind

present, the "incentive of [the Attorney General's] delegate to certify is marked." Martinez et al. 115 S.Ct. at 2229.

As the Supreme Court went on to note, the impetus to certify becomes overwhelming in a case like this since there would be no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale--or at least sparing the purse--of federal employees.

Finally, the Court found perplexing, and thus rejected emphatically that the Courts would only rubber-stamp the certification decision of a scarcely disinterested executive officer, and be stripped of capacity to evaluate inde-

pendently whether that decision is correct.

Thus Supreme Court mandated that the District Court was to conduct independent review of the facts which support the certification, not simply hold again that the certification was prima facia evidence, and then again switch the burden of proof to the Appellant, but deny limited discovery, and an evidentiary hearing on the disputed issues of fact.

Despite this mandate for independent judicial review, which the District Court viewed as complicating the process (A-85), the District Court held that the Certification was prima facia evidence (A-88).

However, in truth the District Court and the Fourth Circuit have found

the certification conclusive, since they denied even limited discovery and permitted no evidentiary hearing.

The record shows that there are only four material facts which are not in dispute between the parties:

1. It is agreed that Mr. Lamagno had been drinking just shortly after office hours (around 6 p.m.) until 10:45 p.m. (approximately four and a half hours), prior to the accident.

2. It is agreed that Mr. Lamagno did drive at a high rate of speed through an intersection, and thereby caused the accident.

3. It is agreed that Mr. Lamagno was driving away from the direction of his hotel at the time of the accident.

4. It is agreed that the accident occurred after normal work hours and at a great distance from his hotel.

All other material facts are in dispute:

a. there is a dispute whether or not Mr. Lamagno was simply drinking at a "DEA hangout;" rather than attending "an official dinner."

b. there is a dispute whether or not Mr. Lamagno had been previously in Barranquilla, and was in fact in the company of an unknown Colombian girlfriend at the time of the accident; rather than having never been previously in Barranquilla and was with Intelligence Analyst Julia Bermann.

c. there is a dispute whether or not Mr. Lamagno was so under the influence of alcohol that he was driving

recklessly at a high rate of speed without stopping through intersections; or rather was not under the influence of alcohol.

d. there is a dispute whether or not there exist an official DEA policy regarding the escorting of female agents by male agents.

e. there is a dispute whether or not the Drug Enforcement Administration falsified the 1991 accident report, and affidavits.

Despite these numerous disputes of material facts The Fourth Circuit held that the Certification of Scope of Employment was conclusive based on self serving declarations of other government employees, who were not subject to discovery and an evidentiary hearing, where they would be cross examined.

However, as noted the United States Supreme Court has already specifically addressed and rejected that some special weight of credibility be given to these declarations.

In the instant action, the Supreme Court specifically held that the courts must be mindful that in the instant case, the incentive of the Attorney General's delegate to certify is marked. Furthermore the Supreme Court held that the impetus to certify becomes overwhelming in a case like this since there would be no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale--or at least sparing the purse--of federal employees. Finally, the Court found perplexing, and rejected

emphatically the argument raised again that the Courts only rubber-stamp the certification decision of a scarcely disinterested executive officer, and be stripped of capacity to evaluate independently whether that decision is correct. Katia Gutierrez de Martinez et al. v. Dirk A. Lamagno, et al., __ U.S. __, 115 S.Ct. 2272 (1995) at 2229.

CONCLUSION

The facts not in dispute are that Mr. Lamagno was driving after work hours, and away from both the "DEA hangout" and his hotel.

The facts in dispute are whether he was driving recklessly at a high rate of speed, while under the influence of alcohol, in the company of an "unidentified Hispanic woman," and not in the company of a female DEA employee; and

that there exist no "DEA policy" that male agents escort female agents.

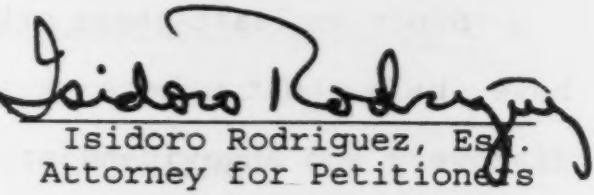
Despite the Supreme Court's remand order in Martinez, the Fourth Circuit accepts as true the self serving statements of executives scarcely disinterested as true.

Since at least three other circuits have held that there must be both discovery and an evidentiary hearing to determine the scope of employment issue when there are disputes of fact, this Court should grant certiorari so to resolve the holdings in the United States Courts of Appeals for the Ninth, Third and District of Columbia Circuits, and that of the Fourth Circuit Court of Appeal holding denying even limited discovery and an evidentiary hearing to resolve this key disputes of fact.

Therefore this Court should issue a writ of certiorari so to assure conformity among the circuits in the application of 28 U.S.C. § 2679(d)(1).

Respectfully submitted,

KATIA GUTIERREZ DE MARTINEZ,
EDUARDO MARTINEZ PUCCINI,
AND HENNY MARTINEZ DE PAPAIANI,

By 
Isidoro Rodriguez, Esq.
Attorney for Petitioners

LAW OFFICE OF ISIDORO RODRIGUEZ P.C.
Calle 84 No. 56-51
Piso 2, Office 4
Barranquilla, Colombia S.A.
Telephone and Telefax
(011)5753-554870
Virginia Bar No. 21573

APPENDIX

APPENDIX

INDEX

A. Katia Gutierrez de Martinez, Eduardo Martinez, Puccini, and Henny Martinez de Papaiani, v. Dirk A. Lamagno, December 7, 1995, decision of the United States District Court for the Eastern District of Virginia.

B. Katia Gutierrez de Martinez, Eduardo Martinez, Puccini, and Henny Martinez de Papaiani, v. Dirk A. Lamagno, April 24, 1997, decision and Order of the United States Court of Appeal for the Fourth Circuit from the Supreme Court's remand order.

APPENDIX-A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI, and HENNY MARTINEZ DE PAPAIANI,	)
Plaintiffs,	)
	)
Civil Action No. 93-55-A	)
v.	)
DIRK A. LAMAGNO,	)
Defendant.	)

MEMORANDUM OPINION

This matter comes before this Court on Plaintiffs' Motion to Conduct Limited Discovery, on the United States' Motion to Substitute and Dismiss, and Defendant Lamagno's Motion to Dismiss. This lawsuit arises from an automobile accident involving the parties which took place in Barranquilla, Columbia on January 18, 1991. Defendant Lamagno is

an agent with the Drug Enforcement Administration ("DEA") and at the time of the accident was stationed in Bogota, Columbia. Plaintiffs are citizens of Columbia.

On the date of the accident, Lamagno was in Barranquilla performing investigatory duties. Upon his arrival, the Barranquilla Resident Office assigned Lamagno a DEA Ford Bronco. Lamagno states in a declaration that, on the evening of the accident, he attended an official dinner at a local restaurant during which DEA business was discussed. Afterwards, Lamagno was asked to drive a female agent back to the hotel where they were staying. Lamagno got lost in traveling the few blocks from the restaurant to the hotel. He collided with Plaintiffs' vehicle some distance

from the direct route to the hotel. The plaintiff driver lost consciousness, suffering facial injuries and broken arms. One passenger also lost consciousness, and complains of migraine headaches, and problems with balance. The other passenger suffered neck strain and disorientation.

On May 8, 1991, Plaintiffs filed an administrative claim with the DEA. That claim was referred to the Department of Justice, Civil Division, Torts Branch and is still pending. To avoid the running of the statute of limitations, Plaintiffs filed their Complaint on January 15, 1993, naming Lamagno, the DEA, and the United States an defendants. Plaintiffs alleged six counts, four of which charged that Lamagno's common law negligence resulted

in Plaintiffs' various injuries. This Court took jurisdiction pursuant to 28 U.S.C. §§ 1332, 1346.

Pursuant to the provisions of 28 U.S.C. § 2679 (d)(1), the United States Attorney for the Eastern District of Virginia certified that Lamagno was acting within the scope of his employment. The United States filed a Notice of Substitution. Though Plaintiffs requested judicial review of the certification, this Court held the certification conclusive and entered an order substituting the United States for Lamagno. While 28 U.S.C. § 1346(b) provides a general waiver of sovereign immunity for lawsuits pursuant to the Federal Tort Claims Act, there is an exception at 28 U.S.C. § 2680 (k) for those actions arising in a foreign

country. Accordingly, this Court found no waiver of sovereign immunity and granted the United States' Motion to Dismiss all counts.

Though the Fourth Circuit affirmed, the Supreme Court, on appeal, reversed, solely on the question of whether the scope of employment certification is reviewable. Gutierrez De Martinez v. Lamagno, 115 S. Ct. 2227 (1995). The Court held that certification was subject to judicial review and remanded for proceedings consistent with that opinion. Since the Supreme Court's decision, the United States Attorney has recertified that Lamagno was acting within the scope of his employment.

This Court must now review the United States Attorney's certification. Plaintiffs have requested limited

discovery on this issue of certification. This Court must first consider whether to grand limited discovery and, if necessary, an evidentiary hearing, or whether to decide the matter on the submissions of the parties. A look to other circuits that have reviewed certification provides some guidance.

The certification should be reviewed de novo. Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993), cert. denied, 115 S. Ct. 58 (1994); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991). The certification is prima facie evidence, but not conclusive evidence, that the federal employee was acting within the scope of his employment. Melo v. Hafer, 13 F.3d 736 (3rd Cir. 1994); Schrob v.

Catterson, 967 F.2d 929, 935 (3rd Cir.1992); Brown V. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991). The Plantiff has the burden of coming forward whit specific facts rebutting the certification. Schrob, 967 F. 2d at 935; Brown, 949 F.2d at 1012. If the Court is able to determine the facts without an evidentiary hearing, the Court can rule based on the certification, pleadings, documentary evidence, and affidavits. Schrob, 967 F.2d at 936.

In determining whether to conduct an in camera proceeding or to allow limited discovery, the Court must balance "the need for a meaningful review of the scope certification with the need to protect federal employees from burdensome discovery." Schrob, 967 F. 2d at 936. In Meridian, supra, the

Ninth Circuit upheld an ex parte review of certification, finding that review by an impartial judge satisfied both the FBI's interest in keeping certain documents which related to an ongoing investigation confidential and the interests of the Plaintiff. It is with these principles in mind that the Court determines whether to grant Plaintiffs' request for limited discovery.

The Court finds that the material facts relating to the scope of employment issue are not in dispute and that additional discovery would not develop any additional facts. Counsel for Plaintiffs stated in oral argument that he would like to depose the defendant and the Consul. Plaintiffs indicate that this might yield further relevant information, but have failed to

allege any specific facts or information that discovery will yield that is relevant. Defendant has submitted a declaration that fully describes his activities on the night of the accident. There are no specific allegations that his deposition would turn up anything new that is relevant. Additionally the defendant has submitted the declarations of Eli Madrid, Julia A. Bermann, Calvin G. McFarland which corroborate the defendant's statement. There is no factual dispute necessitating limited discovery. As such, this court may review the certification based on the evidence already before it.

The parties agree that this Court should apply the law of Virginia in determining whether the defendant acted within the scope of employment. Virginia

employs a two-prong test. An employee's action falls within the scope of employment if

> (1) it be something fairly and naturally incident to the business, and (2) if it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to the perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

Tri-State Coach Corp. v. Walsh, 188 Va. 299, 307 (1948) (quoting Davis v. Merrill, 133 Va. 69, 77 (1922). Defendant's evidence show that on the day of the accident, he reported to Barranquilla to perform investigatory duties and was assigned a government jeep. That night, he drove to an official dinner. Afterwards, Defendant

was asked, pursuant to security policy, to drive another female agent back to the hotel. Defendant states that he was unfamiliar with the area and got lost, though the hotel was but a few blocks away.

Plaintiffs offer only the location of the accident and speculation that Lamagno was intoxicated and with an unidentified woman. Plaintiffs offer nothing to rebut defendant's declaration that the area was unfamiliar and he was lost. Defendant's has stated that the "unidentified" woman was DEA agent Julia Bermann. Ms. Bermann has made a declaration corroborating that she was in the defendant's car. Finally, Plaintiffs offer the observations of two civilian persons. One, a homeowner near the scene of the accident, states that

the defendant showed "signs of drunkenness (i.e. slow and unsteady movements)." (De Rueda Aff. ¶ (e).) Given the undisputed evidence that the parties were involved in a serious collision, this is hardly surprising. Another, plaintiff passenger Martinez de Papaiani, states she observed the defendant "with a strong breath of alcohol, and moving as [sic] he was drunk." (Martinez de Papaiani Aff. ¶(g).) While Defendant admits that he consumed some alcohol on that night, there is no evidence that any person investigating the accident suspected that the defendant was intoxicated. Declarations submitted on behalf of the defendant states he was never observed under the influence of alcohol on the night of the accident. (Madrid Decl. ¶

5; Bermann Decl. ¶6.) Based on the evidence before it, the Court concludes that there is insufficient evidence on which to set aside the United States Attorney's certification.

The next issue this Court must address is the United States' Motion for Substitution and Motion to Dismiss. Due to the determination that the defendant acted within the scope of his employment, the Court must substitute the United States for defendant Lamagno pursuant to 28 U.S.C. § 2679(d)(1) and this case proceeds under the Federal Tort Claims Act. It is well-established that one cannot sue a severing without its consent. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941). Though the Federal Tort Claims Act

provides a general waiver of sovereign immunity, Congress expressly provided an exception at 28 U.S.C. §2680(k). This section excludes claims arising from acts or omissions occurring in a foreign country. United States v. Spelear, 338 U.S. 217 (1949). This action arose in Columbia. Since Plaintiffs cannot pursue their common law negligence claim against the United States, The motion of the United Stated is granted and this case is dismissed.

An appropriate order will issue.

_____

United States District Judge

Alexandria, Virginia
December 7, 1995

APPENDIX-B

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Katia Gutierrez De Martinez; Eduardo Martinez Puccini; Henry Martinez De Papaiani,

Plaintiffs-Appellants,

v.

DRUG ENFORCEMENT ADMINISTRATION;

No 96-1156

United States of America,

Defendants-Appellees,

and

Dirk A. Lamagno,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA 93-55-A)

Argued: January 29, 1997

Decided: April 24, 1997

Before HAMILTON, WILLIAMS, and MICHAEL, Circuit Judgess.
Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Hamilton and Judge Michael joined.

COUNSEL

ARGUED: Isidoro Rodriguez, **LAW OFFICE OF ISIDORO RODRIGUEZ**, Barranquilla, Colombia, for Appellants. Rachel Celia Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellees. **ON BRIEF:** Helen F. Fahey, United State Attorney, Alexandria, Virginia, for Appellees.

WILLIAMS, Circuit Judge:

Katia Gutierres de Martinez, Eduardo Martines Puccini, and Henny Martinez de Papaiani (Appellants) appeal from the district court's conclusion that Drug Enforcement Agency (DEA) Special Agent Dirk A. Lamagno was acting within the scope of his federal employment when his vehicle collided whit that of Appellants. After reviewing the scope-of-employment certification issued by the Attorney General's designate on behalf of Lamagno, the district court dismissed Lamagno,

substituted the United State as the proper defendant, see 28 U.S.C.A. §2679(d)(1) (West 1994), an dismissed the action against the United States for lack of subject-matter jurisdiction, see 28 U.S.C.A. § 2680(k) (West 1994). Prior to this case, we have not allowed review of scope-of-employment certifications, thus we must first consider the appropriate standards under which this review is to be conducted. Because we conclude that the district court followed the correct review procedure and reached the right result, we affirm.

I.

After leaving a restaurant in Barranquilla, Colombia, on the evening of January 18, 1991, Lamagno was driving his government-issued Ford Bronco when

he collided with a car driven by Gutierrez de Martinez. Gutierrez de Martinez and her passengers, Martinez Puccini and Martinez de Papaiani, were injured. The undisputed facts are that Lamagno had a female passenger; that the restaurant was only two blocks from the hotel where Lamagno was staying; that the accident occurred more than 20 blocks from either the hotel or the restaurant; that at the time of the accident, Lamagno was driving in the opposite direction from the hotel; and that Lamagno had been drinking.

The parties differ, however, in explaining these facts. Lamagno claims that he and Julia Bermann, an intelligence analyst with the DEA, were attending a DEA office dinner where

official business was discussed. After the meeting and in accordance with DEA policy that female agents not travel alone after dark, lamagno was assigned to escort Bermann to the hotel where both were staying. Lamagno and Bermann assert that they became lost in the unfamiliar streets of Barranquilla. He further maintains that although he had been drinking, he was not intoxicated at the time of the accident. Appellants, on the other hand, claim that the restaurant was a "DEA hangout" and that Lamagno drank alcohol there before leaving with "an unidentified" thin Hispanic looking woman with long black hair."(Appellant's Br. at 4.) They also claim that Lamagno violated local traffic laws by driving recklessly and by ignoring the right-of-way, that there

was no DEA policy requiring females to be accompanied after dark, and that Lamagno's passenger was not a federal employee.

Based on these allegations, on January 16, 1993, Appellants filed a commonlaw tort action, invoking diversity jurisdiction, in the District Court for the Eastern District of Virginia against Lamagno, the DEA, and the United States.[1] The United States Attorney for that district issued a one paragraph scope-of-employment certification for

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[1] Appellants, prevented from filing suit in Colombia because of diplomatic immunity, also filed an administrative claim with the DEA on May 8, 1991. They sought relief under 21 U.S.C.A. §904(west 1994), which provides a discretionary remedy for torts that arise from DEA operations in a foreign country. This claim is still pending.

Lamagno on March 4, 1993, stating that Lamagno was acting within the scope of his employment as a DEA agent when the accident occurred. The district court, relying on Johnson v. Carter , 983 F.2d 1316(4th Cir. 1993)(en banc), held that the certification was conclusive and unreviewable. Accordingly, on March 5, 1993, the district court dismissed Lamagno and substitute the United States in his place. See 28 U.S.C.A. §2679(d)(1)(West 1994). Thereafter, the district court dismissed the United States for lack of subject-matter jurisdiction under the foreign claims exception to the Federal Tort Claims Act (FTCA). See 28 U.S.C.A. §2680(k) (West 1994).

This court, also relying on Johnson, agreed that the certification

was unreviewable and therefore affirmed. See Gutierrez de Martinez v. Lamagno, 23 F.3d 402 (4th Cir.1994)(per curiam)(unpublished). Recognizing that the Circuits were split, the Supreme Court granted certiorari, reversed, and remanded the case to this court for further proceedings.[2] See Gutierrez de Martinez v. Lamagno, 115 S. Ct.2227, 2237 (1995). We remanded the case to the district court. When the district court reopened the case, the United States Attorney for the Eastern District of Virginia refiled the certification that Lamagno was acting within the scope of

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[2] The Supreme Court left intact our dismissal of Appellants' "headquarters" claim for negligence by the DEA and 42 U.S.C.A. §1981 (West 1980)claim for discriminatory acts by the DEA. Therefore, these claims are not at issue here.

his employment. Later, Appellants requested limited discovery and an evidentiary hearing. The United States submitted a memorandum in opposition, requesting an in camera judicial determination of the challenge to the scope-of-employment certification. Thereafter, the district court ordered the parties to submit briefs, affidavits, and documentary evidence on the issue of Lamagno's scope of employment. Appellants moved to file a second amended complaint, and the United States filed a motion to substitute itself for Lamagno, See 28 U.S.C.A. § 2679(d)(1), and to dismiss the claim against the United States, see 28 U.S.C.A. §2680(k).

After considering the parties' briefs and numerous submissions, and

after hearing argument by counsel for both parties, the district court ruled that additional discovery would not develop any facts material to the scope-of-employment question. The district court then upheld the scope-of-employment certification, again substituted the United States for Lamagno, and dismissed the action against the United States. Appellants appeal only the scope-of-employment decision, conceding that an action against the United States is barred by the foreign claims exception to the FTCA.

II

In response to Westfall v. Erwin, 484 U.S. 292(1988), which held that federal employees could claim absolute immunity from state-law tort actions

only if their conduct was "Within the outer perimeter of an official's duties and...discretionary in nature,"id, at 300, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, see Pub. L. No. 100-694.§§ 5-6, 102 Stat. 4564(codified at 28 U.S.C.A. §2679(West 1994)(commonly called the Westfall Act). In addition to rejecting the specific holding of Westfall, the Westfall Act provided:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, an the United States shall be substituted as the party defendant.

28 U.S.C.A. §2679(d)(1). By regulation, the United States Attorneys are authorized to issue certifications on behalf of the Attorney General. See 28 C.F.R.§15.3(a)(1996). As noted above, we have previously declined to review certifications issued under the Westfall Act. See Johnson V. Carter, 983 F.2d 1316(4th Cir.1993)(en banc). However, in light of the Supreme Court's decision in Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995), this position is no longer tenable.

The fundamental question on appeal, then, is the propriety of the district court's conclusion on remand that Lamagno was acting within the scope of his employment at the time of the accident. Because we have not previously

allowed the review of scope-of-employment certifications, it is necessary to determine the correct standards to apply. Both parties agree that, because the scope-of-employment question on an undisputed or established set of facts under the Westfall Act is one of law, we review the district court's resolution of it under a de novo standard.[3] See Lawson v. United States, 103 F.3d 59, 60 (8th Cir. 1996) (stating that the appellate court "reviews] the scope-of-employment determination de novo");Aversa v. United States, 99 F.3d

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[3] This is a separate question from the standard under which the certification itself is to be reviewed. Here, we note only that review of the district court's scope-of-employment determination is de novo; we consider the underlying question - under what standard the certification is reviewed in the first instance - infra at pages 8-13.

1200, 1210(1st Cir.1996)(nothing, in a Westfall Act. case, that "[w]e review the district court's scope of employment determination de novo"); Coleman v. United States, 91 f.3d 820, 823(6th Cir.1996)(stating that a scope-of-employment certification is "reviewable...on the appellate level as a question of law under a de novo standard").

The Westfall Act, in conjunction with the FTCA, makes clear that a plaintiff seeking relief against a federal employee is not entitled to a jury trial on the scope-of-employment issue, even if the relevant state law would provide a jury trial. See Brown v. Armstrong, 949 F.2d 1007, 1011-12(8th Cir. 1991)(rejecting plaintiff's claim

that a jury trial was required on scope-of-employment question). Under the Westfall Act,"[u]pon certification, any action or proceeding subject to [28 U.S.C.A.§ 26 79(d)(1), (d)(2),or (d)(3)] shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C.A. §2679(d)(4); see also 28 U.S.C.A. § 1346(b)(West 1993). One of the "limitations and exceptions" applicable to a suit under §1346(b)is that "[a]ny action against the United States under section 1346 shall be tried without a jury." 28 U.S.C.A.§2402(West 1994). Because the possible liability of the United States turns in principal part upon the

resolution of the scope-of-employment question, and because suits against the government are not "suits at common law" as contemplated by the Seventh Amendment, the denial of the right to a jury trial under the Westfall Act, like the denial of a jury trial under the FTCA, does not offend the Seventh Amendment. See U.S. Const. Amend. VII; see also Salmon v. Schwarz,948 F.2d 1131, 1142(10th Cir.1991)(observing that "[t]he denial of a jury trial under the FTCA does not run afoul of the Seventh Amendment"); cf. McElrath v. United States, 102 U.S. 426, 440(1880)(suits against the government in the Court of Claims are not "suits at common law" under the Seventh Amendment). Therefore, the district court may resolve disputed issues of fact in considering a

challenge to a scope-of-employment certification. If the district court does resolve disputed issues of fact, we review these factual finding for clear error. See Billings v. United States, 57 F.3d 797, 800 (9th Cir.1995)(nothing, in a Westfall Act case, that the court "reviews] the relevant district court's finding of disputed fact for clear error"); Green v. Hall, 8 F.3d 695, 698(9th Cir. 1993)(explaining that "[w]here facts relevant to [the scope-of-employment] inquiry are in dispute,... we review the district court's factual findings for clear error").

The remaining question, then, is the procedure by which the district court is to review the Attorney

General's certification.[4] Courts that have considered the issue, including those that allowed review of Scope-of-employment certifications before the Supreme Court's decision in this case, have fashioned a fairly uniform body of law governing review at the district court level. The Attorney General's certification in conclusive unless challenged. See Billings, 57 F.3d at 800. When the certification is challenged, it serves as prima facie evidence and shifts the burden to the

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[4] Because Appellants filed the action in federal court on the basis of diversity jurisdiction, this is not a case where removal is an issue. See 28 U.S.C.A. §2679(d)(2) (West 1994). Moreover, because the Attorney General's designate did in fact issue a scope-of-employment certification, this case does not involve a petition by the defendant federal employee for certification by the district court. See 28 U.S.C.A. §2679(d)(3)(West 1994).

plaintiff to prove, by a preponderance of the evidence, that the defendant federal employee was acting outside he scope of his employment. See Palmer v. Flaggman, 93 F.3d 196, 198-99 (5th Cir. 1996)(Staying that "the burden of proof lies with the plaintiff to show that the Attorney General's initial decision was incorrect"(footnote omitted);Coleman,91 F.3d at 823 (Stating that the Attorney General's Certification provides prima facie evidence that an employee's conduct is within the scope of employment); Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996)(Stating that "the Attorney General's certification is prima facie evidence that the employee acted within the scope of his employment"); Anthony v. Runyon, 76 F.3d210, 213, 215 (8th Cir 1996)(nothing

that "Westfall certification acts as prima facie evidence that the defendants were acting within the scope of their employment, "and that after certification, "plaintiffs have the burden of coming forward with specific evidence in rebuttal" (internal quotation marks omitted)); see also Billings, 57 F.3d at 800 (holding that"[c]ertification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment"); Kimbro v. Velten, 30 F.3d, 1501, 1509 (D.C. Cir. 1994) (explicitly agreeing with the Circuit's view that a certification is "entitled to 'prima facie' effect" and "obliges the plaintiff to come forward after reasonable discovery with evidence supporting his allegations both as to

scope and as to the merits"(citations omitted)); Schrob v. Catterson, 967F.2d 929,935 (3d.Cir.1992)(explaining that the Attorney General's scope-of-employment "certification, although subject to judicial review, is prima facie evidence that the employee's challenged conduct was within the scope of employment,"and requiring that the plaintiff" come forward with specific facts rebutting the certification"); Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir. 1991) (holding that "the Plaintiffs have the burden of showing that the defendants' conduct was not within the scope of employment"). In assessing whether the plaintiff has rebutted the prima facie case, however, the district court should not defer to the Attorney General's certification,

but should instead review the question de novo. See Palmer, 93 F.3d at 198-99 (stating that it gave "no judicial deference to the Attorney General's findings"); Anthony, 76 F.3d at 213 (stating that "the district court must independently review the case and determine whether the defendant was in fact acting within the scope of his or her employment"); see also Kimbro, 30 F.3d at 1509 (nothing that the certification has no "particular evidentiary weight"); Schrob, 967 F.2d at 936 n.13(explaining that deference to the certification "is not justified, for the certification should be reviewed de novo by the district court"); Meridian Int'l Longistics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991) (concluding, in asking "what level of

deference the district court should afford the certification," that review of the certification is "de novo"); Hamrick, 931 F.2d at 1211 (holding that the district court should engage in a "de novo review to determine whatever the certification was proper"); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1543 (11th Cir. 1990)(nothing that "the Attorney General's scope certification does not warrant judicial deference"), amended on other grounds, 924 F.2d 1555 (11th Cir. 1991); Nasuti v. Scanell, 906 F.2d 802, 813 (1st Cir. 1990)(holding that, for substitution purposes, the scope-of-employment question must "be independently resolved by the court").[5]

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[5] We note that giving no deference to the scope-of-employment certification for

Finally, we recognize that immunity under the Westfall Act, like other forms of absolute and qualified immunity, "is an immunity from suit rather than a mere defence to liability."Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (discussing qualified immunity); see also Jamison v. Wiley, 14 F.3d 222, 227 (4th Cir. 1994)(nothing that the

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substitution purposes does not render the certification a nullity. The certification "shall conclusively establish scope of office or employment for purposes of removal," see 28 U.S.C.A. §2679(d)(2), thereby ensuring that the scope-of-employment determination is made in a federal tribunal without burdening the defendant federal employee with a jury trial. Moreover, the scope-of-employment certification places the burden of proof on the plaintiff, thereby requiring the Plantiff to come forward with evidence to prove that the defendant federal employee was acting outside the scope of his employment. Therefore, the certification is given affect, albeit a more limited one that we held prior to the Supreme Court's decision in this case.

Westfall Act gave "federal employees an absolute immunity from common law tort actions that was functionally equivalent to-if not perfectly congruent with - the immunity that they had enjoyed under the common law"); Schrob, 967 F.2d at 935 (recognizing "Congress' intent to 'protect federal employees from the uncertain and intimidating task of defending suits that the challenge conduct within the scope of their employ'" (quoting Brow v. Armstrong, 949 F.2d 1007, 1011 (8th Cir. 1991)). Accordingly, in light of the recognized desirability of quickly resolving the scope-of-employment issue, we agree with those courts that have held that "the district court should ensure that both the discovery and [any evidentiary hearings] are circumscribed as narrowly

as possible, although these are matters within its discretion." Schrob, 967 F.2d at 936; see also Brown, 949 F.2d at 1012 ("[C]hallenges to the Attorney General's certification must be resolved before trial, as soon after the motion for the substitution as practicable, even if an evidentiary hearing is needed to resolve relevant fact disputes."). Therefore, the district court may allow (in its discretion) limited discovery or conduct an evidentiary hearing, but should not do so if the certification, the pleadings, the affidavits, and any supporting documentary evidence do not reveal an issue of material fact. It is for the district court to assess the sufficiency of the evidence produced by the plaintiffs. Only if the district court concludes that there is a genuine

question of fact material to the scope-of-employment issue should the federal employee be burdened with discovery and an evidentiary hearing.

In short, the scope-of-employment certification is prima facie evidence that the defendant federal employee acted within the scope of his employment, thereby placing the burden on the plaintiff to prove otherwise. If the plaintiff does not come forward with any evidence, the certification is conclusive. Moreover, the plaintiff submission must be specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation. If the plaintiff's evidence is

sufficient to carry the burden of proof, the defendant federal employee or the Government may come forward with evidence in supportof the certification. At this point, the district court may permit(and limit) any needed discovery. Thereafter, the district court must determine whether there are any genuine issues of fact material to the scope-of-employment decision, and, if so, it may conduct an evidentiary hearing to resolve these factual issues. Once any factual issues are resolved, the district court should weigh the evidence on each side to determine whether the certification should stand. During this process,the district court should remain cognizant of the considerations weighing against protected litigation under the Westfall Act.

III

We turn now to the application of these principles to the scope-of-employment certification at hand. Appellants first argue that the district court should have allowed discovery and a evidentiary hearing before dismissing the action against Lamagno. In their view, additional discovery would have afforded them an opportunity to depose Lamagno and Bermann, thereby exposing possible inconsistencies in their stories. They do not point, however, to any specific evidence that could be uncovered by further discovery beyond the speculative possibility of inconsistency.

We review the district court's discovery decisions for abuse of

discretion. See Jamison v. Wiley, 14 F.3d 222, 236 (4th Cir. 1994)(holding that "the district court did not abuse its discretion in holding an evidentiary hearing on the scope-of-employment issue"); Schrob v. Catterson, 967 F.2d 929, 936,(3d Cir. 1992)(nothing, in an action under the Westfall Act, that pretrial discovery decisions "are matters within [the trial court's] discretion"). Under this standard, we affirm the district court's refusal to allow additional discovery and an evidentiary hearing.

The district court, properly balancing "the need for a meaningful review of the scope certification with the need to protect federal employees from burdensome discovery," Schrob, 967

F.2d at 936, concluded "that the material facts relating to the scope of employment issue are not in dispute and that additional discovery would not develop any additional facts" (J.A. at 89). The district court reached this conclusion after reviewing numerous affidavits and after specifically asking Appellants to identify any material factual disputes. Other courts, faced with similar circumstances, have refused to require discovery and an evidentiary hearing. See Anthony v. Runyon, 76 F.3d 210, 214 (8th Cir. 1996)("Although we have indicated that it may be necessary for the court to conduct an evidentiary hearing to resolve the scope-of-employment issue, a hearing is not required in every case." (citations omitted)); Woods v. McGuire, 954 F.2d

388, 391 (6th Cir.1922)(affirming, under abuse of discretion standard, district court's refusal to allow further discovery before substitution and dismissal); Forrest City Mach. Works, Inc. v. United States, 953 F.2d 1086, 1088 (8th Cir. 1992)(holding that, when plaintiff present no specific evidence contradicting the scope-of-employment certification, discovery before dismissal is unnecessary). Because every factual issue pressed by Appellants is adequately addressed in Lamagno's supporting affidavits, the district court rightly reviewed the certification without allowing discovery or conducting an evidentiary hearing.

IV

The question remains: Did the district court properly conclude that Lamagno was acting within the scope of his employment at the time of the accident? In answering this question, we apply the law of the state where the conduct occurred. See Jamison v. Wiley, 14 F.3d 222, 227 n.2(4th Cir. 1994)(nothing "that whatever particular conduct was 'within the scope of employment' for purposes of Westfall Act immunity was to be determined not by reference to a uniform body of federal common law, but by reference to the respondeat superior law of the state in which the conduct occurred"); see also Aversa v. United States, 99 F.3d 1200, 1209 (1st Cir. 1996)(collecting cases); cf. Williams v. United States, 350 U.S.

857 (1955)(per curiam). Here, although the conduct at issue took place in Colombia, the parties have agreed to the application of the law of the forum state, Virginia. [6]

Under Virginia law, an employee acts within the scope of his employment if:

> (1)[The act] was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to

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[6] Lamagno acknowledges that"[t]his case presents a novel twist" because of the choice-of-law issues. (Appellee's Br. at 9 n.According to Lamagno, this difficulty explains in part the foreign claims exception to the FTCA. Here, the law governing the underlying tort is not in issue. Accordingly, that choice-of-law issue need not be resolved - the parties' stipulation to Virginia law is only for purposes of the scope-of-employment issue.

> further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

Kensington Assocs. v. West, 362 S.E.2d 900, 901 (Va. 1987)(quoting Broaddus v. Standard Drug Co.,179 S.E.2d 497,503-04 (Va.1971))(second alteration in original); see also Johnson v. Carter, 983 F.2d 1316, 1330(4th Cir. 1993)(en banc)(noting that, under Virginia law, the conduct "must be fairly and naturally incident to the employer's business, be done while the employee was engaged in the employer's business, and be done with a view to further the employer's interests"), overruled on other grounds by Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227(1995). For

the most part, Virginia courts take a fairly broad view of scope of employment, and hold that even intentional torts may be within the scope of employment. See Plummer v. Center Psychiatrists, Ltda., 476 S.E.2d 172, 174-75(Va.1996)(concluding that a psychiatrist who sexually assaulted a patient may have acted within the scope of his employment); Commercial Bus. Sys.,Inc. v. BellSouth Servs., Inc., 453 S.E.2d 261, 266 (Va. 1995)(holding that "Willful and malicious acts" that were "outrageous and violative of [the] employer's rules" might nonetheless be within the scope of employment). There are, however, limits. For example, in Smith v. Landmark communications, Inc., 431 S.E.2d 306 (Va. 1993), the court held that a paper carrier was acting

outside the scope of his employment while riding his bicycle from his home to the location where he picked up the newspapers to be delivered. In the court's view, "[t]he mere act of traveling to work was not a natural incident of [the employer's] business and, thus, it did not place [the paper carrier's] actions within the scope of the employment relationship." Id. at 308. Similarly, in Kensington Assocs., 362 S.E.2d at 903-04, the court concluded that a security guard acted outside the scope of his employment when he accidentally shot a co-worker during "horseplay." The court found it significant that the employee "engaged in horseplay in an attempt to scare [a co-worker] when he injured [the plaintiff]. In addition, [the employee]

had been drinking at the time, which [the employer] strictly prohibited." Id. at 903.

Here, whether Lamagno had been attending an official dinner or not, his act of accompanying Bermann to the hotel "was expressly or impliedly directed by the employer," id.at 901, provided that there was a DEA policy requiring that the female agents be accompanied after dark. On this point, Appellants argue only that the purported DEA policy did not exist. Based on our review of the record, the proffered evidence does not support this argument. Eli Madrid, who served as the Resident Agent in Charge of the DEA Office in Barranquilla at the time of the accident, submitted an affidavit stating that "[b]ecause of

the...high crime in Barranquilla, I had instituted a policy wherein all female employees would be escorted at all times after dark." (J.A. at 53.)Similarly, Calvin G. McFarland, who served as Chairman of the DEA Board of Professional Conduct that investigated Lamagno's accident, submitted an affidavit stating that "Lamagno was specifically requested to transport another DEA employee, an Intelligence Analyst on temporary duty in Colombia, to the hotel as well." (J.A. at 60) Lamagno and Bermann corroborated the existence of the disputed DEA policy in their own affidavits. On the other hand, Appellants have presented no evidence to refute the existence of this policy. At oral argument, counsel for Appellants argued that the policy was "unlikely"

because it was "sexist" and "old-fashioned." Despite this speculation, we agree with the district court that Appellants have failed to create a genuine issue of fact material to the policy's existence. We therefore conclude, like the district court, that Lamagno was acting pursuant to DEA policy when the accident occurred, and that therefore his actions satisfy the first element of the Kensington test.[7]

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[7] This case is readily distinguishable from Smith v. Landmark Communications, Inc., 431 S.E.2d 306(Va. 1993). Smith held only that transportation to and from work is ordinarily outside the scope of employment. Here, however, Lamagno claims that DEA policy required that female agents be accompanied while traveling at night and that he was carrying out this duty by escorting Bermann to her hotel. (J.A. at 49.) It is this policy that places Lamagno's actions within the scope of his employment.

Appellants further argue that, because Lamagno was intoxicated, his actions arose "wholly from some external, independent, and personal motive" on his part, see Kensington Assocs., 362 S.E.2d at 901, and therefore could not have been within the scope of his employment. In other words, Appellants argue that even if Lamagno's actions satisfy the first element of the Kensington test, they fail the second. We conclude that the district court rightly rejected this argument. Appellants rely on two affidavits to argue that Lamagno was intoxicated. We believe these affidavits are insufficient to raise a genuine issue of material facts. In the first of these two affidavits, Teresa de Rueda, who witnessed the accident, stated that

Lamagno and Bermann "showed signs of drunkenness (i.e. slow and unsteady movements)." (J.A. at 25.) Similarly, in the second of these affidavits Appellant Martinez de Papaiani claimed that he saw Lamagno after the accident "with a strong breath of alcohol, and moving as [if] he [were] drunk." (J.A. at 35.) On the other hand, Madrid state in his affidavits, "I spent wheel over an hour with S/A [Special Agent] Lamagno at the scene of the accident. During that the time, I spoke with him at length and observed his actions. S/A Lamagno did not appear to be under the influence of alcohol or impaired in any other way when I observed him and spoke with him at the scene of the accident." (J.A. at 53-54.) Similarly, both Lamagno and Bermann denied that they were

intoxicated when the accident occurred. After reviewing these affidavits, we agree with the district court that Appellants failed to present evidence inconsistent with Lamagno's position and failed to forecast the likelihood of discovering such evidence. Because Lamagno has just been involved in a serious accident, it is hardly surprising that his movements were "slow" and "unsteady." Moreover, Lamagno admitted that he had been drinking at the restaurant. Therefore, the claim that his breath smelled of alcohol does not contradict his version of events. Furthermore, the policy accident report, prepared after Colombia police interviewed witnesses at the scene, makes no mention of alcohol playing a role in the accident.

Having concluded that the district court correctly found that Appellant failed to present sufficient evidence to show that Lamagno was intoxicated, we must consider whatever, under Virginia law, the fact that he had been drinking alcohol rendered his acts beyond the scope of his employment. As noted above, the court in Kensington rejected a claim of respondeat superior liability because, among other things, the employee "had been drinking at the time, which [the employer] strictly prohibited," 382 S.E.2d at 903. Kensington, however, does not support Appellants' argument that drinking alcohol by itself is sufficient to defeat the employment relationship. First, the employee's consumption of alcohol was only one factor mentioned by

the Kensington court in concluding that the employee acted outside the scope of his employment. The court found it more significant that the employee "engaged in horseplay in an attempt to scare [a co-worker] when he injured [the plaintiff]," and that "[n]either the 'horseplay' nor the resulting shooting was done to further Kensington's interests, but arose wholly from an independent, external, and personal motive on [the employee's] part to perform an act upon his own account." Id. Therefore, this case differs from Kensington in that Lamagno was not acting "wholly from an independent, external, and personal motive," but was instead attempting to further his employer's interests by observing a DEA policy. Second, the Kensington court

specifically noted twice that the employer strictly prohibited drinking on the job. See id. at 901 (nothing that "drinking while on duty was prohibited by" the employer); id. at 903 (stating that the employer "strictly prohibited" drinking on duty). Here, the record is silent as to any DEA policy prohibiting employees from drinking while performing acts within the scope of their employment.

We, therefore, conclude that Kensington does not mean that an employee always acts outside the scope of his employment merely by consuming alcohol. Moreover, after reviewing general Virginia respondeat superior law, we are convinced that Virginia courts would reject the argument

consumption of alcohol vitiates the employment relationship. As noted above, the Virginia courts generally take a broad view of the employment relationship, and have held that even intentional torts may be within the scope of employment. See Plummer, 476 S.E.2d at 174-75; Commercial Bus. Sys., Inc., 453 S.E.2d at 266. It would be odd indeed to recognized that an intentional sexual assault could be within the scope of employment, see Plummer, 476 S.E.2d at 174-75, while also holding that the consumption of alcohol rendered all subsequent acts necessarily outside the scope of employment. We therefore conclude that, applying Virginia law, drinking alcohol by itself does not remove the employee from the scope of his employment.

There remain only Appellant's allegations that Lamagno was over 20 block away from his hotel and was accompanied by an unidentified Hispanic female. These allegations, however, cannot defeat Lamagno's assertions that he was lost, that the unidentified female was DEA Agent Bermann, and that his distance from the hotel was due to his unfamiliarity with the area. Again, Appellants present no evidence inconsistent with this version of events, and we agree with the district court that "there is insufficient evidence on which to set aside the United States Attorney's certification." (J.A. at 91.)

V

In conclusion, we hold that a scope-of-employment certification

produced under the Westfall Act is prima facie evidence that the defendant federal employee acted within the scope of his employment, and that it places the burden on the plaintiff to prove otherwise. Appellant's allegations and assumptions are no basis upon which to set aside the scope-of-employment certification, and the district court did not err in denying Appellants' request for additional discovery and an evidentiary hearing. Accordingly, we affirm the district court's conclusion that Lamagno was acting within the scope of his employment when the accident occurred. The motion to substitute the United States for Lamagno was properly granted.

AFFIRMED

Filed: May 5, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1156
(CA-93-55-A)

Katia Gutierrez de Martinez, et al,
Plaintiffs - Appellants,

versus

Drug Enforcement Administration, et al,
Defendants - Appellees.

O R D E R

The Court amends its opinion filed April 24, 1997, as follows:

On page 5, first full paragraph, lines 6-9 -- The sentence is changed to read: "Both parties agree that the scope-of-employment question under the Westfall Act is one of law. Accordingly, we review the district court's ultimate

resolution of the scope-of-employment question under a de novo standard."

On page 5, footnote 3 -- the note is changed to begin: "As discussed infra at page 7-9, we review for clear error any factual finding upon which the legal scope-of-employment determination rest. Moreover, this is a separate Question. . . ."

For the Court - By Direction

/s/ Patricia S. Connor

Clerk

Supreme Court, U.S.
FILED
SEP 16 1997

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No. 97-104

In the Supreme Court of the United States

OCTOBER TERM, 1996

KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

v.

DIRK A. LAMAGNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA L. HERWIG
PETER R. MAIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the court of appeals properly held that the district court did not abuse its discretion in denying petitioners' request for discovery and an evidentiary hearing on whether a federal employee was acting within the scope of his employment, as certified by the Attorney General pursuant to 28 U.S.C. 2679(d)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Anthony v. *Runyon*, 76 F.3d 210 (8th Cir. 1996)	6, 7
Brown v. *Armstrong*, 949 F.2d 1007 (8th Cir. 1991)	6
Forrest City Mach. Works, Inc. v. *United States*, 953 F.2d 1086 (8th Cir. 1992)	7
Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995)	3, 5, 6
Hamrick v. *Franklin*, 931 F.2d 1209 (7th Cir.), cert. denied, 502 U.S. 869 (1991)	6
Kimbro v. *Velten*, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995)	6-7
Melo v. *Hafer*, 13 F.3d 736 (3d Cir. 1994)	7
S.J. & W. Ranch, Inc. v. *Lehtinen*, 913 F.2d 1538 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991)	6
Schrob v. *Catterson*, 967 F.2d 929 (3d Cir. 1992)	6, 7
Wang v. *United States*, 947 F.2d 1400 (9th Cir. 1991)	7

Statutes:

Controlled Substance Act, § 709, 21 U.S.C. 904	2
Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048	2
Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563	2

Statutes—Continued:

	Page
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 2679(b)(1)	2
28 U.S.C. 2679(d)(1)	2
28 U.S.C. 2679(d)(3)	7
28 U.S.C. 2680(k)	3, 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-49b) is reported at 111 F.3d 1148. The opinion of the district court (Pet. App. 1a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997. The petition for a writ of certiorari was filed on July 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, who are citizens of the Republic of Colombia, were involved in an automobile accident in Barranquilla, Colombia with respondent Dirk A. Lamagno, a Special Agent employed by the Drug

Enforcement Administration (DEA). At the time of the incident, Lamagno was driving a government-owned Ford Bronco and was accompanied by a female passenger. Pet. App. 1a-3a.

Petitioners filed an administrative claim with the DEA as required by Section 709 of the Controlled Substances Act. See 21 U.S.C. 904 (as amended by the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048). The DEA referred the claim to the Department of Justice, which has not yet made an administrative determination on that claim. Pet. App. 3a.

Petitioners also filed this action in the United States District Court for the Eastern District of Virginia based on diversity of citizenship. The United States Attorney certified on behalf of the Attorney General that Lamagno was acting within the scope of his office or employment under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, and moved to substitute the United States as the defendant. See 28 U.S.C. 2679(d)(1).[1] The district court substituted the United States in place of Lamagno, whom it dismissed from the action. The district court further granted the United States' motion to dismiss the suit on the ground that the United States has retained its sovereign immunity

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[1] The Westfall Act provides immunity to federal employees for torts committed while acting within the scope of their employment by requiring that the United States be substituted as the defendant and that the suit proceed under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* See 28 U.S.C. 2679(b)(1).

for suits based on claims arising in a foreign country. See 28 U.S.C. 2680(k). On appeal, the court of appeals concluded that the Attorney General's certification was not judicially reviewable and affirmed the district court's order substituting the United States as a defendant and dismissing the action. Pet. App. 7b-8b.

2. This Court reversed the court of appeals' decision and held that the Attorney General's scope of employment certification under 28 U.S.C. 2679(d)(1) is judicially reviewable. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995). On remand, the United States Attorney, on behalf of the Attorney General, recertified that Lamagno was acting within the scope of his employment, and the government again moved to substitute and to dismiss under 28 U.S.C. 2680(k). Pet. App. 1a, 5a-6a.

Over the government's opposition, petitioners sought limited discovery and an evidentiary hearing to determine the propriety of the Attorney General's certification. Based upon the parties' submissions of briefs, affidavits, and documentary evidence on the issue of Lamagno's scope of employment, the district court held that "the material facts relating to the scope of employment issue are not in dispute and that additional discovery would not develop any additional facts." Pet. App. 8a. The court explained that "[t]here is no factual dispute necessitating limited discovery," because petitioners "have failed to allege any specific facts or information that discovery will yield that is relevant." *Id.* at 8a-9a. Accordingly, the court found that it "may review the certification based on the evidence already before it." *Id.* at 9a.

Turning to the evidence presented in support of the government's certification, the district court considered the affidavits of Lamagno and DEA agent Julia

Bermann. Lamagno averred that, at the time of the accident, he was driving a female DEA employee to a hotel following an official dinner at a nearby restaurant, that he did so pursuant to a DEA policy requiring the escort of female agents at night, and that he became lost while driving to the hotel. Pet. App. 10a-11a. Bermann's affidavit confirmed that she was the female passenger in Lamagno's car and corroborated other aspects of Lamagno's affidavit. *Id.* at 11a, 13a; see also *id.* at 39b, 42b-43b.

The district court concluded that Lamagno was acting within the scope of his employment. Pet. App. 11a-13a. It specifically rejected petitioners' "speculation" that Lamagno was intoxicated at the time of the accident. *Id.* at 11a. The court observed that, although Lamagno admitted that he had consumed some alcohol on that night, "there is no evidence that any person investigating the accident suspected that the defendant was intoxicated," and "[d]eclarations submitted on behalf of the defendant state[d] [that] he was never observed under the influence of alcohol." *Id.* at 12a. "Based on the evidence before it," the district court concluded "that there is insufficient evidence on which to set aside the United States Attorney's certification." *Id.* at 13a. Accordingly, the court substituted the United States for Lamagno and dismissed the action against the United States under 28 U.S.C. 2680(k). Pet. App. 13a-14a.[2]

3. The court of appeals affirmed. Pet. App. 1b-49b. The court found that the district court did not abuse

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[2] Petitioner does not challenge the district court's conclusion that if Lamagno was acting within the scope of his employment, the action was properly dismissed under 28 U.S.C. 2680(k).

its discretion in denying petitioners' request for discovery and an evidentiary hearing. *Id.* at 29b-32b. The court reasoned that petitioner did "not point * * * to any specific evidence that could be uncovered by further discovery beyond the speculative possibility" that depositions of Lamagno and Bermann would "expos[e] possible inconsistencies in their stories." *Id.* at 29b. Applying a *de novo* standard of review (*id.* at 13b, 50b-51b), the court also concluded that the district court properly found that Lamagno was acting within the scope of his employment at the time of the accident. *Id.* at 33b-48b.[3]

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' request for discovery and an evidentiary hearing on the propriety of the Attorney General's scope of employment certification. Petitioners presented no evidence to contradict the affidavits and documents that provided the basis for the certification. Petitioners were not entitled to discovery merely to question the affiants in the hope of securing answers that would contradict their sworn statements. See Pet. App. 8a-9a, 29b-32b. Further review by this Court is not warranted.

1. This Court held in *Gutierrez de Martinez* v. *Lamagno* that scope of employment certifications are subject to judicial review. See 515 U.S. at 422-423 & n.3 (citing cases). That decision left undisturbed the

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[3] Like the district court, the court of appeals applied Virginia law to determine when an employee acts within the scope of employment. Pet. App. 9a-10a; *id.* at 33b-48b. Petitioner does not challenge the court of appeals' application of Virginia law to this case.

standards developed by the courts of appeals for conducting such review.

Under those standards, a district court makes a *de novo* inquiry to determine whether a federal employee acted within the scope of employment at the time of the incident giving rise to the claim. Courts have held that the certification is *prima facie* evidence that the employee's challenged conduct was within the scope of employment. See, *e.g.*, *Kimbro* v. *Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); *Brown* v. *Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1543 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991). "If the matter is disputed, the burden then shifts to the plaintiff, who must come forward with specific facts rebutting the certification." *Schrob* v. *Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); see also *Kimbro*, 30 F.3d at 1509; *Brown*, 949 F.2d at 1012; *Hamrick* v. *Franklin*, 931 F.2d 1209, 1211 (7th Cir.), cert. denied, 502 U.S. 869 (1991); *S.J. & W. Ranch, Inc.*, 913 F.2d at 1543. In the event that the plaintiff offers such evidence, the district court must make an independent determination that the federal employee was acting within the scope of his employment. See, *e.g.*, *Anthony* v. *Runyon*, 76 F.2d 210, 213 (8th Cir. 1996); *Kimbro*, 30 F.3d at 1509.

Contrary to petitioners' contention (Pet. 15-18), the decision below does not conflict with the decisions of the courts of appeals holding that limited discovery and an evidentiary hearing are required when there is a disputed issue of material fact on the question whether the federal employee was acting within the scope of his employment. See, *e.g.*, *Kimbro*, 30 F.3d at 1508 (reading 28 U.S.C. 2679(d)(3) "as a directive that,

where necessary, the court conduct an evidentiary hearing to determine the scope of employment issue"); accord *Melo* v. *Hafer*, 13 F.3d 736, 747 (3d Cir. 1994).[4] Indeed, the decision below recognizes that discovery may be warranted if a plaintiff submits "specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification." See Pet. App. 27b-28b. Because petitioners in this case have not created a disputed issue of material fact, the court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' request for discovery and an evidentiary hearing. *Id.* at 29b-32b. That holding is consistent with the decisions of other courts of appeals. See, *e.g.*, *Anthony*, 76 F.3d at 214 ("Although we have indicated that it may be necessary for the court to conduct an evidentiary hearing to resolve the scope-of-employment issue, a hearing is not required in every case.") (citation omitted); *Melo*, 13 F.3d at 742 ("If the facts can be determined without an evidentiary hearing, the court can rule on a pretrial motion to substitute or to set aside the substitution based on the certification, pleadings, documentary evidence, and affidavits.") (quoting *Schrob*, 967 F.2d at 936); *Forrest City Machine Works, Inc.* v. *United States*, 953 F.2d 1086, 1088 (8th Cir. 1992) (holding that district court did not err in denying plaintiffs' request for discovery when plaintiffs "have not come forward with any evidence contradicting the

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[4] The other case petitioners cite (Pet. 16), *Wang* v. *United States*, 947 F.2d 1400, 1402 (9th Cir. 1991), is inapposite. That decision held that the district court's exclusion of plaintiffs from an evidentiary hearing on the scope of employment issue was prejudicial error.

government's scope-of-employment certification and supporting exhibits").

2. Petitioners also assert (Pet. 21-22) that there are disputed issues of material fact on whether Lamagno was acting within the scope of his employment at the time of the accident. That fact-bound contention, however, does not warrant this Court's review. In any event, both courts below correctly held that petitioners had failed to demonstrate any factual disputes material to the scope-of-employment determination. Pet. App. 8a-9a; *id.* at 29b-32b. The courts carefully considered the evidence presented by the government that, on the night of the accident, Lamagno was driving a female DEA agent to her hotel following an official dinner, that he was driving her pursuant to an official DEA policy that female agents be escorted at night, and that he was not intoxicated at the time of the accident. *Id.* at 9a, 11a-13a, 38b-43b.

Although petitioners asserted that Lamagno was not acting within the scope of his employment as defined by DEA policy at the time of the accident, they did not offer any specific evidence to contradict respondents' evidence and therefore failed to establish a material issue of fact that warranted either discovery or an evidentiary hearing. See Pet. App. 29b (noting that petitioners "do not point * * * to any specific evidence that could be uncovered by further discovery beyond the speculative possibility of inconsistency"). The court of appeals properly concluded that, "[b]ecause every factual issue pressed by [petitioners] is adequately addressed in Lamagno's supporting affidavits, the district court rightly reviewed the certification without allowing discovery or conducting an evidentiary hearing." *Id.* at 32b.

Accordingly, the court of appeals correctly ruled that Lamagno was acting within the scope of his employment when the accident occurred and that the district court properly granted the motion to substitute the United States.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA L. HERWIG
PETER R. MAIER
Attorneys

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[5] Petitioners also suggest (Pet. 20) that the courts below treated the scope-of-employment certification as "conclusive." Both courts expressly rejected that notion, however, and conducted a *de novo* review of the Attorney General's certification. See Pet. App. 6a; *id.* at 21b-23b & n.5.